STATE OF MICHIGAN
IN THE SUPREME COURT

PENNIE MARIE DAVIS,	Supreme Court No. 161836
Plaintiff-Appellee,	COA # 344203
v	LC #16-344-CZ
JACKSON PUBLIC SCHOOLS,	
Defendant-Appellant.	

_____/

MEGAN A. BONANNI (P52079)
BETH M. RIVERS (P33614)
CHANNING E. ROBINSON-HOLMES (P81698)
PITT, McGEHEE, PALMER BONANNI & RIVERS, P.C.
Attorneys for Plaintiff-Appellee
117 West Fourth Street, Ste. 200
Royal Oak, MI 48067
(248) 398-9800
mbonanni@pittlawpc.com
brivers@pittlawpc.com
crobinson@pittlawpc.com

TIMOTHY J. MULLINS (P28021)
JOHN L. MILLER (P71913)
GIARMARCO, MULLINS & HORTON, P.C.
Attorneys for Defendant-Appellant
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
jmiller@gmhlaw.com

_____/

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT'S

APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant failed to incorporate a statement of jurisdiction in its application. However, this court has jurisdiction under MCR 7.305 to consider an application for leave to appeal. Defendant's application, filed within 42 days of the Court of Appeals' decision issued on July 2, 2020, is timely. However, this Court lacks jurisdiction to grant the application for leave to appeal as Defendant has not established that the issues raised involve legal principles of major significance to the state's jurisprudence or that the decision of the Court of Appeals was clearly erroneous and will cause material injustice or conflicts with a decision of this Court. See MCR 7.305 (B) (3) and (5).[1]

[1] Although Defendant contends that MCR 7.305(B) (1) and (2) support its application, neither section is applicable. Section 1 applies to the validity of a legislative act, which is not at issue here and Section 2 applies only to claims against the state, which is not a defendant in this case.

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court applied the correct causation standard and properly utilized the standard jury instruction, M Civ JI 107.03, defining causation in Plaintiff's claim brought pursuant to the Whistleblowers' Protection Act, as the instruction was requested and is an accurate statement of the law as recognized by this Court.

The trial court answered "yes"

The Court of Appeals answered "yes"

The Plaintiff-Appellee answers "yes"

The Defendant-Appellant answers "no"

II. Assuming arguendo that the trial court committed an instructional error, did the Defendant fail to demonstrate that the purported error resulted in such unfair prejudice that the failure to vacate the jury verdict would be inconsistent with substantial justice?

The Plaintiff-Appellee answers "yes"

The Defendant-Appellant answers "no"

The trial court did not address this issue

The Court of Appeals did not address this issue

III. Since the defendant did not request or argue for the application of a but-for standard of causation in its motion for summary disposition, the trial court never identified a causation standard in denying the motion for summary disposition and finding an issue of

material fact for resolution by the jury and the Defendant did not raise the issue in its appeal to the Court of Appeals, did the Defendant fail to preserve this issue for appeal?

The trial court did not address this issue

The Court of Appeals did not address this issue

The Plaintiff-Appellee answers "yes"

The Defendant-Appellant answers "no"

IV. Did the trial court properly deny the motion for a new trial due to alleged attorney misconduct because the challenged comments of plaintiff's counsel were fleeting and unintentional, were remedied by curative instructions requested by Defendant's counsel at the time that the comments were made and during final jury instructions and did not change the outcome of the trial?

The trial court answered "yes"

The Court of Appeals answered "yes"

The Plaintiff-Appellee answers "yes"

The Defendant-Appellant answers "no"

INTRODUCTION

The Plaintiff, Pennie Davis, devoted her professional life to the Jackson Public Schools ("JPS") where she worked as an art educator and maintained an unblemished record of performance for 29 years. Unfortunately, Davis' stellar record with the JPS ended only because she engaged in the legally protected activities of reporting to the Jackson Police that she had been assaulted by a student and obtaining a PPO from the court to protect herself from her assailant, a troubled teen with a history of violent and defiant behavior at the JPS.

Pennie Davis reasonably expected JPS Superintendent Jeff Beal and Assistant Superintendent Ben Pack to show concern for a teacher with such an exemplary record. Instead, in their first contact with Davis after the assault, Pack and Beal angrily confronted Davis, accusing her of feigning her injury or, shockingly, hitting her own hand with a hammer. School Administrators were angry that Davis reported the criminal behavior to the police and sought protection from the court instead of keeping the incident quiet, private and contained within the district. Within just a few days of reporting the assault to the police and this Court, JPS Administrators embarked on a campaign to destroy Davis' career: confronting her on at least two occasions, issuing her an unwarranted written verbal warning, and suspending her indefinitely. JPS was also lackadaisical in providing Davis with protection when the assailant student was found loitering near Davis' room, requiring her to report this ongoing behavior to the court. The lack of concern for Davis' safety is particularly questionable in light of the fact that the student actually pled guilty to the assault and was sentenced to 93 days in a juvenile facility and ordered to pay Davis restitution.

Despite the fact that a plan had been successfully put into place and the student was finally adhering to the terms of the PPO, JPS abruptly transferred[2] Davis from her position as curriculum chair of the JPS High School Art Department to an inferior and far less desirable assignment as a Middle School art teacher.[3] During the transfer meeting, Assistant Superintendent Pack explained the reason for the transfer, explicitly telling her, "We do not go to the police here." This is unrefuted and direct evidence of JPS' motivation for retaliating against Davis for her protected activity.

Sadly, the harassment continued at Parkside Middle School, with school administrators failing to provide Davis with required curriculum training, branding her a "failing teacher" within a mere 32 days of transfer and officially rating her as "ineffective." As a result of this failing rating, over the following school year, Davis was subject to constant scrutiny and if she had been rated as "ineffective" again at the close of the 2016-2017 school year, she would have been terminated pursuant to the union contract.[4]

The case was tried to a jury. After listening to evidence during an eight-day trial, the jury returned a verdict for Plaintiff finding that Defendant's actions toward her violated the Whistleblowers Protection Act, MCL 15.361 et seq. The jury awarded Plaintiffs damages in the amount of $388,485. (Exh 25) Unhappy with the result, the Defendant first sought a new trial and then appealed the verdict to the Court of Appeals. Although the Defendant appealed a myriad of

[2] Defendant claims that Plaintiff had to be transferred because the student was legally entitled to a "free and appropriate education." Yet Defendant did not transfer Plaintiff for a month after the PPO was issued. Moreover, the student could have obtained a free and appropriate education at the alternative high school where he was eventually transferred for other transgressions after Plaintiff was involuntarily transferred to the middle school.

[3] Defendant misleadingly describes this as simply a move to a different building. In reality Plaintiff was transferred from the high school where she was the curriculum chair to the middle school teaching 6th grade art.

[4] Although Defendant did eventually allow Plaintiff to return to the high school, JPS did not "accommodate" her request. To the contrary, JPS told Plaintiff that she would have to apply for an opening and then be considered along with all other candidates. Defendant also made clear that she was not eligible to transfer back to the high school while on the development plan due to the ineffective rating.

issues and rulings made by the trial court, the Court of Appeals affirmed the judgment entered by the trial court in favor of the Plaintiff. (Exh 27)

In its continuing attempt to avoid responsibility for the verdict awarded by the jury, the Defendant has filed an application for leave to appeal with this Court, but has now limited its attack on the verdict and judgment to only two purported errors. Neither argument justifies granting the application or reversing the conclusions of the jury or well-reasoned opinions of the trial court and the Court of Appeals.

First, citing federal cases analyzing federal statutes, Defendant argues that the trial court "used"[5] the incorrect causation standard by failing to apply a but-for causation standard. However, the trial court applied the causation standard repeatedly enunciated and approved by this Court and included in the standard jury instructions adopted for use in WPA cases. In fact, Defendant has not pointed to a single Michigan case or even a federal case applying Michigan law in which "but-for" causation was adopted as the standard for WPA claims. Moreover, despite the fact that the causation instruction read to the jury did not use the words – "but-for" - the language of the model jury instruction has been interpreted to be consistent with "but-for" causation.

Defendant has also erroneously identified the causation standard applied by the trial court and the jury. Contrary to Defendant's argument, the jury was not instructed to merely consider whether the Plaintiff's protected activity was one of the reasons that she was removed from her position. The jury had to determine whether it was a reason which **made a difference** in the

[5] In its application, the Defendant appears to broaden its argument regarding the causation standard. In the Court of Appeals, the Defendant's only challenge regarding the causation standard concerned the jury instructions utilized by the court. The Defendant argued that rather than the standard instruction, the court erred by failing to use the term "but-for" in its instructions to the jury. Now it appears that Defendant is also arguing that the trial court erred in failing to apply the but-for standard in its analysis of the summary disposition motion. However, Defendant did not argue that the but-for standard should be applied in considering the summary disposition motion. (Exh 1, Def Motion for summary disposition). Nor did Defendant raise that issue before the Court of Appeals. Therefore, it has not been preserved for appeal here.

Defendant's adverse actions toward her.[6] M Civ JI 107.03. Therefore, there was no error committed by the trial court which requires a new trial in this matter. [7]

Defendant also claims that statements made by Plaintiff's counsel during opening argument constitute reversible error, requiring a new trial. The Court of Appeals properly found that the Plaintiff's counsel's comments in opening statement about "sending a message" may have been questionable, but did not rise to the level of misconduct which would support a new trial. As the Court of Appeals concluded, the comments were limited to opening statement and the message was not repeated during the trial. Moreover, the trial court provided a curative instruction immediately after the comments were made and again while issuing final instructions to the jury prior to deliberations. The Court of Appeals properly concluded that the trial court did not abuse its discretion in denying the Defendant's motion for new trial. Thus, Defendant's application for leave to appeal should be denied.

[6] Contrary to Defendant's argument, this standard did not allow the jury to disregard the great weight of the evidence, including the few facts identified by the Defendant. Interestingly, Defendant ignores the direct evidence of motivation by the decision maker who told Plaintiff that she was being removed from her position and transferred to the middle school because "we do not go to the police here." Additionally, Defendant has made no effort to establish that the purported instructional error was inconsistent with substantial justice since based on the overwhelming evidence, including direct evidence of motivation, Plaintiff would have prevailed even if the jury had been instructed differently.

[7] Citing dissents from two cases, Defendant contends that the "motivating factor" standard imposes liability without causation. In actuality, the instruction at issue did not simply require that the protected activity be a motivating factor. Rather Plaintiff had to prove that it was a determinative factor. Moreover, Defendant's argument is premised on a misreading of the dissenting opinions on which it relies. In his dissenting opinion in *Price Waterhouse v Hopkins* 490 US 228, 292 (1989) Justice Kennedy explained that but-for causation was consistent with a motive that made a difference to the outcome. He further explained that if a motive did not make a difference in the outcome, then liability is being imposed without causation. Id at 282. Thus as Justice Kennedy made clear, incorporating the language that the motivating factor made a difference which was utilized in this case is wholly consistent with the "but-for" causation standard requested by Defendant. Additionally, Justice Kennedy never suggested that the definition of "but-for" causation is the one cited by defendant here. Rather Defendant's proposed definition of but-for causation is from the dissenting opinion in case in which the Sixth Circuit was considering but-for causation in the context of a criminal trial for assault against Amish victims brought under the Hate Crimes Act. *US v Miller* 767 F3d 585 (6th Cir 2014).

STATEMENT OF FACTS AND PROCEEDINGS

A. FACTUAL BACKGROUND[8]

The Plaintiff, Pennie Davis, is a well-respected art teacher who has been employed by the Defendant, Jackson Public Schools (JPS), for decades. She began working for JPS in August 1986. From 1989 until her retaliatory transfer to the middle school by the Defendants on November 23, 2015, Davis taught art at the high school and served as the curriculum chair for the Jackson Public School art department for many years. Throughout her tenure at the high school, Davis consistently received excellent performance evaluations reflecting her standing as a highly effective and competent teacher (Exh 1).

All that changed in September 2015 after a student, MH, joined Davis' art class. MH had a long history of violence and other behavioral issues at JPS which were well documented in school records.[9] During his first month in Davis' class, MH continued his pattern of behavioral issues requiring Davis to file multiple reports with the school administration as well as MH's parents. (Exhs 2, 6).

MH threatens and assaults Ms. Davis in her classroom

During class on Monday, October 12, 2015, MH became angry with Davis after she confronted him regarding his behavior. While spewing profanity and threats of injury, MH swung his closed fist at Davis, landing a considerable blow to her right-hand causing injury to the hand. Fearing for herself and her students, Davis ordered MH to leave the classroom. MH refused to comply until Davis began calling school administrators. Davis immediately called Principals Joe

[8] In considering this application, the Court is required to view the evidence in the light most favorable to Plaintiff. Defendant, however, has only citied evidence supportive of its argument, without even noting the conflicting testimony and evidence in the record.

[9] Since middle school, MH had been written up on 65 occasions, including repeated altercations, both verbal and physical, with students and teachers, sexual harassment, violent outbursts, possession of a knife, drug use, defiance of authority and a pattern of denying his actions (Exh 2). MH was repeated suspended and considered for expulsion. (Id). Eventually, he was transferred to the alternative high school in 2016.

Zessen ("Zessen") and Barb Baird-Pauli ("Baird-Pauli") and Superintendent Jeff Beal to inform them of the assault and request assistance in dealing with MH. (Exh 21, Davis at 41, 70). Unable to reach them, Davis left messages stating that a student had assaulted her and that, as a result, her hand was red, swollen, and painful. (*Id*. at 71). Per JPS policy, Davis also electronically recorded the incident in MH's disciplinary log maintained and utilized by JPS. (Exh 2).

Directly after school, Davis went to the Jackson Police Department to report the assault. (Davis at 73; Exh 3). Within the next few days, police initiated its investigation and interviewed several students at Jackson High School.[10] Davis also secured medical treatment for her hand at a walk-in clinic. (Davis at 27, 73). The clinic staff performed an x-ray and wrapped Davis' hand with an Ace bandage. (*Id*. at 27). The treating physician told Davis to keep the Ace bandage fastened for several days and noted this instruction in the note provided to Davis. (*Id*. at 28; Exh 4). [11]

JPS Begins and Ends Incredibly Brief Investigation

Near the end of the school day at 2:43 p.m. on October 12, 2015 after Principal Zessen received word of the assault, he began a perfunctory investigation, interviewing MH and only four of his classmates. (Exh 5; Beal at 43, 44). Administrators did not review MH's disciplinary history. (Beal at 40). No one interviewed Davis. (Exh 5). Nor, surprisingly, did Zessen or JPS administrators wait to conclude its investigation until Davis submitted medical documents regarding her injury. (*Id*.) Instead, immediately after interviewing a few random students, JPS

[10] School administrators including Beal and Assistant Superintendent Ben Pack immediately became aware that Davis had contacted the police. (Exh 22, Beal at 33).

[11] In describing the findings of its investigation and the police investigation as clearing MH, Defendant fails to acknowledge that MH pled guilty to assault, was sentenced to Juvenile detention, and ordered to pay restitution to Plaintiff.

administrators determined that Davis' injury was the result of unintentional "incidental contact" by MH. (Beal at 34).

School policy requires that specific steps be taken after "aggressive physical contact" by a student, including a mandatory 10-day suspension. None of those steps were taken, however, after MH's assault on Davis. (Beal at 77, 78; Exh 7).[12] Instead, JPS only suspended MH for the few remaining hours of the October 12, 2015 school day and removed him from Plaintiff's class for the remainder of the week. (Exh 5).[13]

Tuesday, October 13, 2015: JPS Immediately Began to Retaliate Against Davis

The morning after the assault, on Tuesday, October 13, 2015, Beal and Pack came to Davis' classroom, abruptly requested that she step out into the hall with them and began an onslaught of accusatory questions. (Davis at 73, 74). Knowing she was injured, Beal and Pack demanded that Davis remove the bandage from her hand, so that they could evaluate Davis' injury. (*Id*. at 74; Beal at 22). When Davis protested because her doctor had specifically instructed her not to remove the bandage, Beal and Pack became angry. (Davis at 28, 74). Beal asked Davis if she removed the wrapping when she showered, as if testing the legitimacy of the wrap and her injury. (Exh 8). Pack further threatened Davis that if she did not comply with their demand to remove the bandage then she would be sent home, ostensibly for insubordination and without pay. (Davis at 29, 74). However, Beal intervened and instead directed Davis to submit the note from her doctor, which Davis did. (*Id*. at 29, 30, 74-75; Exh 4).

[12] Specifically, the Jackson High School Handbook for the 2015-2016 school year requires that JPS hold a conference with the involved parties and, further, that the student be mandatorily suspended for ten days, that the Superintendent recommend expulsion to the Board of Education, and that a referral be sent to the police. (Exh 7).

[13] In making this decision, administrators again failed to consider MH's disciplinary history as required by the Jackson High School Handbook (Beal at 34; Exh 7). Furthermore, in other incidents of students assaulting teachers, JPS suspended the student assailant for at least 10 days, and, in some cases, transferred the student to the alternative school or expelled him/her. (Davis at 86, 88).

Davis Secured a Personal Protective Order

MH's disciplinary record indicated that MH did not shy away from repeat violent behavior and at approximately six feet tall and over 200 pounds he was an intimidating figure. (Exh 2; Exh 6 at ¶ 9). Moreover, MH remained in school as if nothing had occurred. Fearful that MH would harm or assault her again, Davis secured a Personal Protective Order ("PPO") from the court on October 13, 2015 which prohibiting MH from confronting or communicating with Davis. (Exh 9).

Thursday, October 15, 2015: JPS Disciplined and Indefinitely Suspended Davis

Davis was absent from work on Wednesday, October 14, 2015 due to illness, but returned to work on Thursday, October 15, 2015. (Davis at 37). Immediately upon her return, Pack issued Davis a written **"verbal warning for not following a directive."** (Exh 8). The directive Pack referenced was contained in an email sent after school hours on October 13, 2015 from Jessica Carter of JPS Human Resources instructing Davis to report to Allegiance Occupational Health so that *another* physician could examine Davis' injury. (Exh 10). Davis explained that she had not seen the email as it was sent after school hours and she had been sick in the interim and only just returned to work. (Davis at 75, 76). Furthermore, Davis had already sought medical treatment and undergone an x-ray on the day of the assault. (Exh 4). Despite Davis' legitimate explanation, Pack immediately issued the written verbal warning; the first Davis had ever received in her entire career. (Exh 8).

Nevertheless, within hours of learning of the directive, Davis visited Allegiance Occupational health per JPS's request. (Davis at 77; Beal at 49; Exh 23, Pack at 19, 20). Consistent with Davis' initial medical assessment, the medical professionals at Allegiance diagnosed Davis with a contusion of her right hand. (Exh 11). The physicians set Davis' right hand in a splint, re-wrapped it, and placed Davis on light duty restriction through October 19, 2015. (*Id.*). At this point,

Davis had visited two physicians, both of whom had seen fit to wrap Davis' right hand and one of whom diagnosed the injury as a contusion. (Exhs 4, 11).

Later that same day, Beal and Pack confronted Davis in the presence of union representative Amy Gish. (Davis at 78). By this time, JPS had received Davis' PPO and both Beal and Pack had become aware of it. (Exh 9; Pack 22, 27). Beal and Pack angrily confronted Davis about the PPO speaking to Davis in a loud, confrontational, and accusatory manner. (Davis at 78; Exh 6 at ¶¶ 10, 11; Beal at 55, 56). Pack, referring to MH, repeatedly badgered Davis, "What is your beef with that kid?" and "How do we know you didn't go home and hit your hand with a hammer and then blame the student?" (Davis at 32, 33, 78; Beal at 57; Pack at 34, 38; Exh 6 at ¶ 12).

In response to these unfounded and offensive accusations, Gish reminded Beal and Pack of MH's long history of violent and defiant behavior. (Exh 6 at ¶ 14). By contrast, Davis was a long-time teacher in excellent standing. Disregarding the character and history of both parties involved, the obvious injury to Davis' hand and the considerable evidence offered by Davis and Gish confirming the assault, Beal and Pack unjustly suspended Davis for an indefinite period of time. (Exh 12; Exh 6 at ¶ 15). Over the course of her 7 years with the district, Gish had attended hundreds of meetings with Pack and Beal but had never observed such unprofessional and aggressive conduct. (Exh 6)

When asked by Gish to provide a reason for the administrative leave, Beal and Pack claimed that the administrators wanted to further investigate the assault. (*Id*.). But JPS undertook no further investigative. JPS did not interview additional witnesses, MH, or Davis. (Beal at 48; Davis at 80). Furthermore, when Gish made a formal request to see the investigative documents which administrators claimed had conclusive proof that Plaintiff was not assaulted, JPS failed to

comply. In fact, JPS did not provide any investigative documents until well after Davis returned to work on October 29, 2015, after a 10-day suspension. (Exh 13; Exh 6 at ¶¶ 17, 18).

Thursday, October 29, 2015: JPS Took No Steps to Ensure Davis' Safety

After a 10-day suspension, Davis returned to work on October 29, 2015. Even at this point, sixteen days after the issuance of the PPO, nobody from JPS explained the requirements of Davis' PPO to MH or made any constructive arrangements with MH to comply with the PPO. (Beal at 61). Upon her return to work, Davis learned that JPS had only removed MH from her class. Instead, during his now "free" period, MH sat in an empty, unsupervised classroom (the band room) adjacent to Davis' art room. (Davis at 23, 65). JPS's actions both failed to provide MH with an education during this period and failed to protect Davis per the terms of her PPO. Jackson High School has four floors with plenty of classrooms in which to educate MH and protect Davis; yet, JPS permitted MH to loiter in an empty classroom adjacent to Davis. (*Id*. at 24). Furthermore, because JPS did not provide MH with any supervision during that class period, MH was free to roam the school and do as he pleased. (*Id*. at 23, 65). Within Davis' first week back to work, MH threateningly pounded his fists on Davis' classroom door. (*Id*. at 24; Exh 15).

Because MH failed to comply with the PPO, Davis continued to look for potential resolutions. She talked to the high school principal about the situation. On November 4, 2015, Davis alerted the Court as to MH's failure to comply with the PPO and submitted documentation seeking a modification of the PPO stating that "MH is in the room next to my room and I feel unsafe with him being so close in the area- we have 4 floors and for MH to be right next to my room I have fear. I ask he not be right next to or across from me. The assault is still in the Court

system." (Exh 15).[14] The only change to the PPO that Davis requested in her Motion to Modify was for MH to stop loitering in rooms adjacent to hers.

On November 5, 2015, Davis also submitted a letter to JPS administrators outlining her safety concerns, specifically her apprehension that administrators were allowing MH to remain unsupervised in the classroom across from her. (Exh 16). Gish sent Principal Baird-Pauli a follow up email on November 6, 2015. (Exh 17). Finally, following Davis and Gish's latest requests for JPS to coordinate a more effective solution to Davis' safety concerns, school administrators developed a more comprehensive plan to limit contact between MH and Davis. (Beal at 63). Part of this plan included alternative routes for MH to take to class so as to avoid Davis' classroom. (Exh 14). Davis considered this arrangement effective and did not submit any additional complaints to JPS or the court**.** (Davis at 83).

November 13, 2015: JPS Transferred Davis to the Middle School at Parkside

The arrangement to separate Davis and MH remained in place for less than a week. During that time, no further incidents took place and Davis raised no complaints. (*Id*.). The issue was resolved to everyone's satisfaction. Nevertheless, on November 13, 2015, a month after the assault occurred, JPS unilaterally decided to transfer Davis in the middle of the semester from Jackson High School, where she had been the art teacher for the last 26 years, to a less desirable assignment at Parkside Middle School. (Exh 18). JPS's purported reasons for the transfer was to comply with the *modified* PPO issued by this Court on November 19, 2015 (almost a week after the transfer decision) and to provide for Davis' safety. (Beal at 62; Pack at 92).[15] JPS declared that because the *modified* PPO, that had not yet received court approval, prohibited MH from being at Davis'

[14] Contrary to Defendant's statement, the uncontroverted evidence is that Plaintiff sought the modified PPO because MH was loitering in the adjacent classroom, not because he was still in the building. This problem was resolved by Plaintiff and school administrators before Defendant involuntarily transferred her.
[15] The original PPO had contained the same provision, yet JPS did not transfer Davis at that point. (Exh 9).

place of work, JPS had no choice but to transfer Davis. (*Id*.). JPS' position has no factual basis. The original PPO contained the *identical* requirements with the understanding that MH was to simply stay away from Davis in order to be compliant. (Exhs 9, 14). Despite his ongoing pattern of defiant behavior, JPS did not consider transferring MH to the alternative high school in order to comply with the PPO or to protect Davis. (Beal at 69).[16] Nor did JPS investigate alternative resolutions with Davis prior to her forced transfer. (*Id*. at 65, 66). Rather, JPS forced Davis to relocate to the Middle School where she would teach a grade and age group she had never before taught under the strictures of the International Baccalaureate program, which was complex and completely foreign to her. (Davis at 26, 27).

Moreover, JPS did not make this decision until and only after a time in which Davis finally felt comfortable in the school. After implementing the plan in which MH actively avoided Davis and the vicinity of her classroom, Davis felt safe, which was the entire point of securing the PPO. (*Id*. at 83). Accordingly, Davis had not submitted any complaints to JPS during the brief time that this strategy had been in place. (*Id*.). Significantly, the court also approved the short-lived plan developed jointly by the school and Plaintiff as it made clear during the November 19, 2015 hearing regarding the modified PPO. (*See* Exh 14). During the hearing, the court emphasized that MH was obligated to avoid Plaintiff but understood that MH attended the school at which Plaintiff taught rendering it unrealistic for the two to never come in sight of each other. (*Id*.)[17] Thus, the court struck the "appearing within sight" provision of the PPO. (*Id*.) At no time did this Court

[16] When Davis suggested that MH be transferred to the alternative high school during this meeting, JPS countered that MH was entitled to an education. (Davis at 87). However, the alternative school obviously provides an education, or else it would not exist. Furthermore, students receive diplomas from the alternative school just as they do at Jackson High School and can continue to participate in extracurricular activities offered by JPS. (Beal at 11; Davis at 87).

[17] In fact, this Court specifically mentioned that queries from JPS were welcome, noting that in other PPOs against students, the principal typically walked the student from class to class. (*Id*.)

express an expectation that Plaintiff be removed from her post as Art Teacher in Jackson High School in order to comply with the PPO. (*Id*.). In fact, the court expressed the opposite.

It is clear that JPS transferred Davis in retaliation for her reporting the assault to the Jackson Police Department and securing a PPO from this Court. From the time that Davis reported the assault, JPS subjected Davis to continuous harassment, unjust disciplinary action, and ultimately an involuntary transfer to a less desirable position. During the transfer meeting, Pack angrily told Davis that JPS would not have transferred Davis if she had not reported the assault to the police, declaring, **"We do not go to the police here."** (Davis at 85, 86)

Ongoing Retaliation at Parkside Middle School

On November 23, 2015, Davis began teaching Art to sixth grade students at the Middle School. Davis had never taught sixth grade students during her twenty-nine year tenure with JPS. (Davis at 27, 61). Furthermore, Davis had never taught under an International Baccalaureate curriculum, which is a specialized curriculum much different from those typically utilized by public schools. (*Id*, at 61, 62). The curriculum is so unique that it requires both preliminary and ongoing training. (Exh 6 at ¶ 31). Yet, JPS failed to provide Davis with the required training prior to her transfer or in the several months that followed. (*Id*. at ¶ 32; Davis at 62). After only 32 days at Parkside, JPS labeled Davis as a "failing teacher," and rated her "ineffective" and "unsatisfactory." (Davis at 59; Exh 19).[18] As a result of the "ineffective rating," JPS placed Davis on an Individual Development Plan in which her performance was constantly scrutinized. (Exh 19*)*. JPS administrators assert that the plan was intended to improve Davis' performance, however, indicators such as Parkside Principal Jeremy Patterson's accusatory statement, "I know what happened at the high school," suggests otherwise. (Exh 6 at ¶ 33). If Davis received a second

[18] Only the year before, JPS rated Davis "highly effective," the highest rating a teacher can receive. (Exh 1).

"ineffective" rating at the end of the 2016-2017 school year, she would have been terminated pursuant to union contract. (Beal at 86).[19]

In January of 2016, MH plead guilty to one count of assault. (Exh 20). He was sentenced to 93 days in a Juvenile Detention Center and ordered to pay Davis $266.50 in restitution. (*Id.*).

B. PROCEDURAL HISTORY

On or about February 8, 2016, Plaintiff filed her complaint in Jackson County Circuit Court. Plaintiff alleged that she was threatened, harassed, disciplined and involuntarily transferred to a less desirable position by the Defendant Jackson Public Schools in retaliation for filing a police report and seeking and obtaining a personal protection order in violation of the Whistleblowers Protection Act, MCL 15.361 et seq.

After the parties engaged in discovery, Defendant filed a motion for summary disposition on March 9, 2017, alleging that there was no genuine issue of material fact to be resolved by the jury. Responding to the motion, Plaintiff set forth sufficient evidence to satisfy all elements required to establish her WPA claim. After hearing extensive argument on April 20, 2017, the trial judge issued his ruling from the bench and concluded that there were sufficient issues of fact to present the case to the jury. (Exh 24). The court found that the plaintiff had established all elements required for her claim, specifically that she had engaged in protected activity, that she suffered an adverse action and that there was a causal connection between the two. Moreover, the court found that there was an issue of fact as to whether Defendant's explanation for its action was pretextual. (Exh 24, pp 30-7) Defendant raised no argument and there was no discussion as to the standard of causation to be applied to the case.

[19] Further trying to paint Davis as a poor performing teacher, JPS attempted to emphasize the significance of parent and student complaints against Davis since her involuntary transfer to Parkside. (*See* Davis at 52-4). However, Parkside receives more student and parent complaints than the High School. (*Id*. at 91).

After denial of the motion, the court set the case for trial by jury. The jury trial commenced on February 26, 2018. After listening to the testimony and observing the demeanor of the witnesses, the jury returned a verdict for Plaintiff on March 7, 2018. (Exh 25) The jury found that Plaintiff had engaged in protected activity and that Defendant had threatened or discriminated against Plaintiff because she engaged in protected activity. The jury awarded Plaintiff the following damages:

Economic damages to date: $10,290

Future economic damages: $2, 240

Non-economic damages to date: $150, 382

Future non-economic damages: $225, 573.

Consistent with that verdict, the court entered a stipulated judgment in favor of the Plaintiff in the amount of $388,485. (Exh 26). The court retained jurisdiction to determine Plaintiff's entitlement to costs and attorney fees and the amount.[20]

Defendant filed a motion for new trial and remittitur, challenging several evidentiary rulings made during the trial as well as the court's decision to utilize the Michigan standard jury instructions. Plaintiff responded to that motion, which was denied by the court on May 22, 2018.

Again, dissatisfied, Defendant filed an appeal challenging the verdict and various decisions of the trial court including the denial of the motion for summary disposition. On July 2, 2020, the Court of Appeals issued a per curiam decision affirming the judgment and all decisions of the trial court.

As to the denial of summary disposition, the Court of Appeals agreed with the trial court that plaintiff demonstrated a causal connection between the protected activity and the adverse action. (Exh 27, p 5) The Court of Appeals concluded that "the evidence, viewed in the light most

[20] The court subsequently entered an order awarding Plaintiff attorney fees. That order has not been appealed.

favorable to plaintiff, showed that after plaintiff reported the assault by MH to the police and obtained a PPO, she was repeatedly treated in a highly unprofessional manner by Pack and Beal, who voiced their displeasure that she decided to report the matter to the police rather than deal with the defendant's administration." (Id, p 6).Relevant to this conclusion, the Court of Appeals found that Plaintiff was transferred and assigned to teach a specialized curriculum for which she received no training within a month of the assault and within days of seeking to modify the PPO, was then classified as a failing teacher and given an unfavorable evaluation for the first time in 29 years with the district. The Court of Appeals also found evidence that Pack accused Plaintiff of fabricating her injury and having a "beef" with MH and told Plaintiff that she would not have transferred if she had not gone to the police.

Citing this Court's decision in *West v General Motors* 469 Mich 177 (2003), the Court of Appeals properly concluded that "plaintiff's evidence supported an inference that defendant's employment actions were taken because it was upset about her decisions to report the assault to the police and pursue adverse employment action because of plaintiff's protected activity." Further the Court of Appeals concluded that Plaintiff introduced sufficient evidence to challenge the credibility of Defendant's proffered justification for the transfer and create a genuine issue of material fact whether its explanation was actually legitimate. (Exh 27, p 7)

The Court of Appeals also considered Defendant's argument that the trial court erroneously instructed the jury when it utilized the model civil jury instruction on causation, M Civ J I 107.03 because it is inconsistent with United States Supreme Court precedent. The Court of Appeals rejected that argument[21], relying on settled precedent and language from this Court from which

[21] "Instructional error warrants reversal when it affects the outcome of the trial." *Hardrick v. Auto Club Ins. Ass'n*, 294 Mich. App. 651, 680, 819 N.W.2d 28 (2011), citing MCR 2.613(A). Because the Court of Appeals found that the trial court instructed the jury consistent with this Court's precedent, the Court did not consider whether the error

the language of the model jury instruction was drawn. See Debano-Griffin v Lake County 493 Mich 169, 175 (2013). [22]

The Defendant also challenged the trial court's decision to deny a new trial due to alleged misconduct by Plaintiff's counsel during opening statements. The Court of Appeals rejected the appeal finding that the comments by counsel were not "concerted, insidious" or a "deliberate pattern of misconduct," that the trial court immediately gave a curative instruction and that the conduct was not repeated. Thus, the Court of Appeals found that the trial court did not abuse its discretion by failing to grant a new trial.

Defendant raised many other objections to the admission and exclusion of evidence and also sought remittitur in its appeal to the Court of Appeals. However, Defendant has apparently abandoned those issues as they were not included in the application for leave to appeal.

STANDARD OF REVIEW

Without preserving the issue on appeal, the Defendant now challenges the trial court's decision denying its motion for summary disposition, claiming that it applied the incorrect causation standard. However, in seeking summary disposition, the Defendant never contended that "but-for" causation applied. (Exh 28, Def Mot for Summary Disposition). Even when challenging the trial court's denial of summary disposition in its appeal to the Court of Appeals, the Defendant did not contend that the incorrect legal standard was applied. Rather Defendant only argued that Plaintiff had not met her evidentiary burden. Thus, the issue has not been preserved for appeal to this court.

---

was harmless. Given that there was evidence that Pack admitted to his retaliatory motive, even if there had been instructional error, it was harmless and did not affect the outcome of the trial.

[22] The Defendant has mischaracterized the Court of Appeals' holding in this case. The Court did not find that based on Supreme Court cases the "but-for standard may seem more viable or have undercut the foundation for this Court's precedent. Rather the Court of Appeals found that "even if" a different standard might seem more viable; the Court of Appeals could not anticipatorily ignore decisions of the Michigan Supreme Court. Exh 27, p 10.

To preserve an issue for appellate review, it must be properly raised, addressed, and decided at trial. *Miller v. Inglis*, 223 Mich.App 159, 168; 567 NW2d 253 (1997). Because defendant did not raise this specific argument before the circuit court, it is unpreserved for appellate review. See *Thames v. Thames,* 191 Mich.App 299, 303–304; 477 NW2d 496 (1991) ("An objection based on one ground is insufficient to **preserve** an appellate attack based on a different ground.").[23] "**Issues** raised for the first time on **appeal** are not ordinarily subject to review." *Gaudreau v. Kelly,* 298 Mich.App 148, 155–156; 826 NW2d 164 (2012). Plaintiff has not properly preserved this issue for appeal, as it was not raised below.

''Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v. Nadell*, 481 Mich. 377, 387, 751 N.W.2d 431 (2008). Accordingly, ''[f]or an issue to be **preserved** for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v. Achievable Visions*, 308 Mich.App. 415, 419, 864 N.W.2d 606 (2014). The failure to timely raise an issue typically waives appellate review of that issue. *Walters*, 481 Mich. at 387, 751 N.W.2d 431.

As this Court previously explained:

> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

[23] As a result, the argument to the Court of Appeals that the trial court erred in denying summary disposition because Plaintiff failed to present sufficient evidence to support her claim does not preserve a challenge to the legal standards of causation that the trial court applied in denying that motion.

Walters, 481 Mich. at 388, 751 N.W.2d 431

Thus, Defendant has failed to preserve this argument for appellate review.

Assuming that Defendant properly preserved this issue, the court reviews de novo a trial court's ruling on a motion for summary disposition. *Chandler v Dowell Schlumberger Inc*., 456 Mich 395, 397; 572 NW2d 210 (1998). Reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the court must determine whether a genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co,* 455 Mich 604, 609; 566 NW2d 571 (1997) cited in *Debano-Griffin v. Lake County Bd. of Comm'rs*, 493 Mich 167, 175(2013)

Summary disposition under MCR 2.116(C)(10) is only appropriate if the moving party demonstrates that there is no genuine issue of material fact regarding an essential element of the non-moving party's case. *Smith v. Globe Life Ins. Co,* 460 Mich 446, 454-455 (1999) "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Skinner v. Square D Co*, 445 Mich 153, 161 (1994).

Defendant also sought a new trial, contending that the trial court made an instructional error which was affirmed by the Court of Appeals. "A court may grant a new trial following a jury verdict only for one of the reasons stated in MCR 2.611 (A) (1)." *Kelly v. Builders Square Inc.,* 465 Mich 29 (2001). The trial court's decision on a motion for new trial will not be reversed absent a clear abuse of discretion. *Allard v. State Farm Ins. Co*., 271 Mich.App. 394, 406, 722 N.W.2d 268 (2006). The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its

discretion and so the reviewing court should defer to the trial court's judgment. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v. Ford Motor Co*., 476 Mich. 372, 388, 719 N.W.2d 809 (2006); *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003).

This Court reviews claims of instructional error de novo. *Cox v. Flint Bd. of Hosp. Managers,* 467 Mich. 1, 8, 651 N.W.2d 356 (2002). "Jury instructions are considered as a whole to determine whether they adequately present the theories of the parties and the applicable law." *Jimkoski v. Shupe*, 282 Mich. App. 1, 9, 763 N.W.2d 1 (2008). "Instructional error warrants reversal only when it affects the outcome of the trial." *Hardrick v. Auto Club Ins*. *Ass'n*, 294 Mich. App. 651, 680, 819 N.W.2d 28 (2011), citing MCR 2.613(A). "A verdict should not be set aside unless failure to do so would be inconsistent with substantial justice." *Johnson v. Corbet*, 423 Mich. 304, 327, 377 N.W.2d 713 (1985); MCR 2.613(A).

Defendant also seeks a new trial, contending that isolated comments by Plaintiff's counsel constituted misconduct. An attorney's comments do not constitute grounds for reversal unless, viewing the record as a whole, they reflect a deliberate attempt to deprive the opposing party of a fair and impartial proceeding. *Hunt v. Freeman,* 217 Mich.App. 92, 95, 550 N.W.2d 817 (1996). "Reversal is required only where the prejudicial statements" reveal a deliberate attempt to inflame or otherwise prejudice the jury, or to "deflect the jury's attention from the issues involved." *Id.*

ARGUMENT

I. The trial court did not err in its interpretation of the WPA or instruction to the jury in accordance with the Michigan Model Jury Instructions

A. The trial court utilized the Model Jury Instruction, which is an accurate statement of Michigan law

In its application, the Defendant seeks the intervention of this Court, claiming that the trial court applied the incorrect causation standard. However, the decision of the trial court and Court of Appeals are consistent with this Court's interpretation of the Whistleblowers' Protection Act, MCL 15.361 and the Michigan Model Civil Jury Instructions. Thus, the Defendant's application should be denied.

Citing cases interpreting federal laws such as the Age Discrimination in Employment Act, 29 USC § 621 et seq and the retaliation provision of Title VII of the 1964 Civil Rights Act, 42 USC 2000e et seq, the Defendant argues that but-for causation is applicable to the WPA, a Michigan statute. The term "but-for" is not used in the WPA. However, Defendant argues that "but-for" is the appropriate causation standard based on the language used in the WPA.

The WPA prohibits retaliation against an employee "because the employee… reports or is able to report, verbally or in writing, a violation or suspected violation of the law… to a public body." MCL 15.362.

In 2002, Michigan adopted model/standard jury instructions applicable to WPA claims.[24] One of those instructions defined "causation" as follows:

> "When I use the term "because of" I mean that the protected activity must be one of the motives or reasons defendant discharged/threatened/discriminated against the Plaintiff. Protected activity does not have to be the only reason or even the main reason, but **it does have to be one of the reasons that made a difference** in defendant's decision to discharge/threaten/discriminate against the plaintiff."

[24] The instruction was amended in 2004.

M Civ JI 107.03.

This model instruction was read to the jury in this matter. Defendant now argues that the use of this model jury instruction was an error of law warranting a new trial pursuant to MCR 2.611(A)(1)(g).[25] However, the trial court is required to give the standard jury instructions when they are applicable and accurately state the applicable law. MCR 2.512(D)(2). The instruction challenged by Defendant was both applicable and legally accurate. Therefore, Defendant's argument is altogether without merit as the jury instruction is a proper statement of law under the WPA.

Disregarding the years and myriad cases in which Michigan courts have utilized this model instruction in WPA cases, Defendant principally relies upon two federal cases interpreting federal law– one of which deals with the federal Age Discrimination in Employment Act ("ADEA") and the other with Title VII – to argue that a "but for" standard of causation applies. Notably, Defendant has not cited to a single case, which has applied "but-for" causation standard in a WPA claim. Nonetheless, Defendant would have this Court alter settled jurisprudence and grant a new trial to apply a different standard for the first time.[26]

While discussing cases interpreting federal statutes at length, the Defendant has ignored decisions of the Michigan Supreme Court which have rejected the argument raised by Defendant regarding the causation standard to be applied to claims under Michigan law. In *Matras v. Amoco* 424 Mich 675 (1986), the Michigan Supreme Court held:

> A jury can find that the discharge was "because of age" even if age was not the sole factor. As accurately expressed in the Michigan Standard Jury Instruction, "[age] does not have to be the only reason, or even the main reason, but it does have to be **one of the reasons**

[25] The Defendant has failed to acknowledge that the challenged jury instruction was a model instruction which must be used if it is an accurate statement of the law.

[26] Despite Defendant's argument that but-for causation is the appropriate standard, Defendant has not explained why the model jury instruction used in this case is inconsistent with that standard.

> **which made a difference** in determining whether or not to [discharge] the plaintiff." Another formulation would be that **age is a determining factor** when the unlawful adverse action would not have occurred without age discrimination. Alternative expressions of the determining factor concept are "but-for causation" or "causation in fact"
>
> In the instant case, the question therefore becomes whether there was sufficient evidence, when the evidence and inferences therefrom are viewed in a light most favorable to Matras, for reasonable jurors to conclude that age discrimination was a determining factor in the decision to discharge him.

Id. at 682–83.

Likewise in *Hazle, supra* this Court held that a plaintiff need only "demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' *Lytle, supra* at 176, 579 N.W.2d 906." Id at 462. The *Hazle* court further explained that the "inquiry at this final stage of the *McDonnell Douglas* framework is exactly the same as the ultimate factual inquiry made by the jury: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision. See SJI2d 105.02." *Id* at 465-6.[27]

Federal cases have also recognized the distinction between Michigan jurisprudence and the interpretation given the ADEA and retaliation claims under federal law. Those cases have concluded that similar statutory language does not necessarily mean that statutes or claims share causation standards and Defendant's argument to that effect is consequently without merit. For example, in *Block-Victor v. CITG Promotions, LLC*, 665 F. Supp. 2d. 797, 805 (E.D. Mich. 2009), the Court distinguished between age discrimination claims under the ADEA and Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") noting that under ELCRA, a plaintiff must prove that the plaintiff's age was a motivating factor in the employer's decision whereas under the ADEA, a

[27] ELCRA employs the same "because of" language as the WPA.

plaintiff must prove that age was the "but-for" cause of the decision. In 2017, the Court again distinguished between these two statutes noting that the ADEA required a "but-for" showing, while ELCRA required a showing that "defendant's discriminatory animus was a 'substantial' or 'motivating' factor in the decision." *Summers v. Walgreen Co*., No. 15-CV-12836, 2017 WL 2591933, at *5 (E.D. Mich. June 15, 2017) (citations omitted).

More recently, the Michigan Supreme Court denied a defendant's application for leave to appeal, which had requested that the Court review the causation standard of the ELCRA similarly relying upon the parallel language of the ADEA. *Hrapkiewicz v. Board of Governors of Wayne State University*, 501 Mich 1067 (2018). In recognition of the settled jurisprudence governing the causation standards of each statute, the Court determined that the issue did not merit review. The same result should be reached here; there is absolutely no reason to disregard firmly established jurisprudence and reject the standard jury instructions.

Ignoring this caselaw, Defendant cites and relies heavily on dicta from an unpublished decision of the Court of Appeals involving a retaliation claim under ELCRA.[28] In *Thompson v. Dept of Corrections*, 2015 WL 1261539 (Mich Ct App 3/19/15), the Court of Appeals reviewed the trial court's decision granting summary disposition on a gender discrimination and retaliation claim brought under ELCRA. The court rejected the plaintiff's claim because he could not prove that the biased supervisor had any control over the internal affairs agents who made the adverse decision. *Id* at *5. The Court did not discuss jury instructions or apply the causation standard in rendering its decision. Given that the *Thompson* case did not involve a WPA claim, did not review

[28] Defendant's citation to *Debano, supra* is also disingenuous. While the court in its conclusion did use the phrase "the motivating factor" this Court set out the proper causation standard earlier in its opinion in which it stated that plaintiff must demonstrate that her protected activity was "a motivating factor for the employer's adverse action." *Id* at 176. Likewise the reference to *Lewis v City of Detroit* 702 Fed Appx 274, 278 (6th Cir 2017) does not support Defendant's position as the Sixth Circuit merely acknowledged the different formulations of the causation standard for ELCRA and ADEA claims but explicitly refused to address the impact of Gross and other federal cases on ELCRA because it was unnecessary to resolution of the appeal.

jury instructions, did not resolve the correct causation standard applicable to any claims but rather applied the cats-paw analysis to resolve the case, did not review a jury verdict, only decided a summary disposition motion and was an unpublished decision which lacks any precedential value, this court should rely on the decisions of this Court discussed above rather than *Thompson*. [29] Thus, the trial court did not err in utilizing the standard jury instructions applicable to WPA claims.

B. Statutory "because of" language has been uniformly interpreted by the Michigan Courts

Defendant has argued that "because of" language contained in the WPA has been interpreted differently by various Michigan courts. In support of this position, Defendant cites the dissenting opinion in *Hrapkewicz v Wayne State University* 501 Mich 1067 (2018) (Markman, dissenting). Defendant's argument, however, is based on a mischaracterization of Michigan cases.

As this Court recognized in *Matras*, supra there are many different formulations for establishing that an adverse action was taken "because of" retaliation or discrimination. Those formulations include the determining factor language incorporated in the Model Jury Instructions as well as but for causation. *Matras, supra* at 682. Thus, in *Hecht v Nat'l Heritage Acads*. Inc 499 Mich 586, 606 (2016), another case cited by Defendant, this Court, citing *Matras*, used the "but-for" language in describing the causation required to establish a claim of race discrimination. As recognized in *Matras*, this was another acceptable formulation of the causation requirement, not a different or higher standard. Thus Hecht merely cited to one of the several acceptable formulations for analyzing whether an employer's adverse action was taken "because of discrimination or retaliation. Moreover, in Hecht, this Court did not address the proper causation standard in a discrimination or retaliation claim as there was no dispute over the causation standard. It was not

[29] Defendant's suggestion that *Thompson* is the only case to consider the causation standard in Michigan is false. It appears that no Michigan case has considered the issue in a WPA case, but several cases have considered the issue under ELCRA and affirmed the standard jury instruction and the "a motivating factor" test.

an issue considered or decided by the Court. Rather the issue was whether there was sufficient evidence to support the jury's verdict.

Since *Matras, supra*, Michigan courts have consistently applied the determining factor standard as incorporated in the Model Jury Instructions. That instruction was utilized in this case. There is no inconsistency in Michigan jurisprudence and no basis to order a new trial here.

C. The Model Instruction is consistent with but-for causation

Confusing motivating factor language with the determining factor standard incorporated in the Michigan Model Jury Instructions, the Defendant mistakenly argues that the trial court applied a "lessened" causation standard. However, the "lessened standard" referenced in the cases cited by the Defendant is not the standard utilized by Michigan Courts or applied in this case.

In *Univ of Texas SW Med Ctr v Nassar* 570 338 (2013) the United States Supreme Court considered the appropriate causation standard for a Title VII retaliation claim. The employer contended that the proper standard was "but-for causation" while the employee argued that the motivating factor language which is incorporated in Title VII applied. That provision provides that: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice" 42 USC § 2000e-2m. This language, which does not require that the 'motivating factor" be a "determinative factor" is a different and lesser causation standard than that approved in *Matras, supra* and included in the model jury instructions. *Nassar, supra* at 348-9. While the motivating factor standard may be less demanding than but-for causation, the same cannot be said for the determining factor test applied here. That standard is the equivalent of the but-for causation. See Matras, supra at 182.

In fact, the United States Supreme recognized this in its recent decision in *Bostock v Clayton County, Georgia* 140 S. Ct 1731 (2020). There, the Court explained that but-for causation does not permit a defendant to "avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." Similarly, in *Burrage v United States,* 134 S. Ct 881, 888(2014), the Court found that the but-for standard satisfied where the retaliatory act was the "straw that broke the camel's back." Again, this is wholly consistent with the determining factor standard applied by the trial court here. [30] Both standards recognize that there may be more than one motivating or "but-for" cause for an adverse action , but the law is only triggered if that cause was a determining factor or one but-for cause for the employer's actions. *Matras, supra*; *Bostock, supra* at 1739. The Model Jury Instruction is entirely consistent with but-for causation as explained by the United States Supreme Court in both *Nassar* and *Bostock*. Thus, the trial court did not commit any instructional error and the Defendant's application for leave should be denied.

D. Assuming arguendo that an instructional error occurred, the error was harmless

The trial court did not commit an error by instructing the jury in accordance with the model jury instructions. While contending that the trial court utilized the wrong causation standard, Defendant does not offer any definition or instruction which would have satisfied its notion of but-for causation. Nor does Defendant explain why the determining factor language of the model instruction is inconsistent with but-for causation. In any event, based on the evidence introduced during the trial, including the direct evidence of retaliatory motivation, any purported error is

[30] *See Braden v Lockheed Martin Corp* 2017 WL 379427 (D NJ 2017) in which the court found that the determining factor language is the "essence of 'but-for'" causation and exceeds the motivating factor language rejected in *Nassar* as a "lessened" standard.

harmless as Plaintiff would have prevailed even if the phrase "but-for" was used rather than the phrase reason "which made a difference."

Plaintiff introduced evidence that she had worked for Defendant for more than 20 years and had an impeccable performance history prior to her whistleblowing activity. Following her report of the assault to the police and request for a PPO, administrators accused Plaintiff of having a "beef" with MH, asked her to unwrap the bandages on her hand, yelled at Plaintiff that they "did not go to the police here," suspended her, and ultimately transferred her to another school. Even after her transfer, Plaintiff was told by the school's principal that he knew what had happened at the High School, she received a poor performance evaluation and did not receive proper training. Evidence was further provided of the ongoing retaliation Plaintiff suffered – despite having returned to the High School, she was placed in a different art room that is greatly inferior to the art room she occupied for most of her career. remained on a performance improvement plan, and was denied art materials as basic as paper requiring her to continue filing grievances. Plaintiff also introduced direct evidence of retaliatory motive as she testified that Pack told her that if she did not go to the police, he would not have moved her to the middle school. As the Court of Appeals concluded: "the evidence was sufficient to demonstrate that defendant took adverse employment action because of Plaintiff's protected activity. (Exh 27, p 6). Thus, even if a different causation standard was applicable, Plaintiff introduced sufficient evidence for the jury to conclude that Plaintiff would not have been terminated "but for" her age. Thus, this is not an appropriate vehicle for review of the causation standard.

Ignoring this evidence and citing only the testimony of its witnesses, Defendant claims the Plaintiff was transferred to comply with the PPO. While this was Defendant's argument, substantial evidence was introduced challenging the credibility of this purported explanation,

including that Pack told Plaintiff that she would not have been transferred if she had not gone to the police. Moreover, the decision to transfer Plaintiff was made before the PPO was actually modified. Additionally, even though the initial PPO prevented MH from appearing at Plaintiff's workplace, Defendant did not transfer her at that time. Instead they devised a plan in which MH and Plaintiff would avoid each other at the high school. Thus, the evidence is sufficient to support the verdict, whether the jury instruction included the phrase determining factor or but-for causation. Any possible error, therefore, is harmless and Defendant's application should be denied.[31]

II. Statements of Plaintiff's Counsel during opening statement do not require a new trial

The Defendant seek review of the Court of Appeals decision which affirmed the trial court's denial of a new trial due to alleged attorney misconduct. The Defendant asserts that isolated comments made by counsel during opening statement so prejudiced the jury that a new trial is required. However, as correctly found by the Court of Appeals, the comments of counsel were isolated and not repeated after the Defendant objected and the court issued a curative instruction. Yet Defendant claims that reversible error was committed.

MCR 2.611 (A) (1) provides that a new trial may be granted "whenever substantial rights are materially affected" due to misconduct of the prevailing party. Here, the Defendant argues that a few comments by counsel that the jury should send a message to teachers and school districts requires a new trial. However, as both the trial court and Court of Appeals found, while the statements may have been questionable, when viewed in context of the entire record, the fleeting

[31] In this application, Defendant appears to argue that the trial court applied the wrong causation standard in deciding the summary disposition motion. However, this issue was not preserved for appeal as Defendant did not argue that but-for causation applied in seeking summary disposition. Nor did Defendant raise this issue before the Court of Appeals.

comments by Plaintiff's counsel did not constitute a deliberate and concerted attempt to inflame the jury.

In a thoughtful opinion, the Court of Appeals concluded that "the remarks were made in the context of explaining to the jury the importance of its function in hearing this case and administering justice. The comments were not made in the context of encouraging the jury to render an award of damages that would send a message to school districts because of its verdict." (Exh 27, p 20). The court also found that the comments were limited to opening statement and not continued during the trial or repeated after defendant's objection. Additionally, the court found that after the defendant raised an objection, the court immediately issued a curative instruction advising the "jury that was not its role to send a message to other school districts in Michigan in deciding the case or to send a message to defendant through any award of damages to plaintiff." The trial court also provided an additional curative instruction during the final jury instructions. Based on these factors, the Court of Appeals found that plaintiff's counsel did not engage in a deliberate attempt to deprive defendant of a fair and impartial proceeding or to prejudice the jury and therefore the trial court did not abuse its discretion in denying a new trial. In reaching this conclusion, the Court of Appeals committed no error, which would require the intervention of this Court.

When reviewing an appeal asserting improper conduct of an attorney, this Court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638 (1982). A lawyer's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Guider v. Smith*, 157 Mich.App. 92, 101, 403 N.W.2d 505 (1987). No new trial is required, however, if an attorney's prejudicial remarks were "fleeting

and unintentional." *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 776, 685 N.W.2d 391, 406 (2004).

Defendant contends that a new trial should have been granted based on these isolated comments made by Plaintiff's counsel's comments during opening statement. (Def brf, p 20-21)

1. The jury should send a message to the school district **(2/26/2018 Transcript at 116)**;
2. That a jury verdict in favor of Plaintiff would send a message to teachers that we applaud their courage **(2/26/2018 Transcript at 116)**;
3. That other schools are watching the outcome of this case **(2/26/2018 Transcript at 116)**; and
4. The jury can ensure that teachers are protected by returning a verdict favorable to the Plaintiff **(2/26/2018 Transcript at 135-136)**.

Defendant argues that in light of the school shooting that happened at Stoneman Douglas High School earlier in February 2018, Plaintiff's counsel's comments during her opening statement emotionally affected the jury and resulted in a verdict that was motived by passion and prejudice rather than the evidence presented during the eight days of trial. Def. Brief at 21-2.

In fact, the verdict was supported by substantial and compelling evidence as set forth in detail above. Clearly the verdict was justified by the evidence and not inflamed by passion or prejudice caused by isolated remarks during opening statement.

To support their argument that the jury was improperly motivated, Defendant cites the infamous case of *Gilbert v. DaimlerChrysler Corp*, 470 Mich 749, 700, 685 NW2d 391 (2004), in which Geoffrey Fieger was found to have made *ad hominem* attacks directed toward DaimlerChrysler. Defendant is comparing this verdict of $388,485.00 to the $21 million awarded

to the plaintiff in *Gilbert.* Not only are the jury awards incomparable, so too are the comments made by the attorneys. Fieger compared the Plaintiff to a victim of the Holocaust, which was a thinly veiled allusion to DaimlerChrysler's new German ownership. *Id.* at 771-772. He also attempted to enflame the jury's patriotism by suggesting to them that they deliver a "distinctly American brand of justice" to a foreign corporation. *Id.* at 772. The Michigan Supreme Court found that Attorney Fieger's statements had the clear aim of making the company's German ownership a critical issue in the trial. *Id.* at 772-773. By associating Plaintiff with a victim of the Holocaust and repeatedly reminding the jury that DaimlerChrysler was a German-owned company, Attorney Fieger was improperly directing the jury to equate the Defendant with the Nazis.

Plaintiff counsel's comments in this case clearly do not rise to the same level of inappropriate inference and insinuation that the comments made in *Gilbert* did. The comments at question in this case made no mention of the larger issue of gun violence in school and did not attempt to connect the individualized violence that the Plaintiff faced to any larger scale, mass violence in schools that may have improperly influenced the jury. Moreover, the comments were made in the context of the jury's role not a request for a large verdict.[32]

Instead of being comparable to the comments made in *Gilbert*, Plaintiff's arguments are more in line with other cases that found Counsel's statements were not improper. In *Hanczaryk v. Chapin,* 2014 WL 5462600 (2014), the Court found that Plaintiff's comments that an insurance

[32] Likewise, this case is not analogous to *Reetz v Kinsman Marine Transit Co* 416 Mich 97 (1982) in which this Court found a new trial was required due to attorney misconduct. There the plaintiff's counsel repeatedly referenced multi-million-dollar verdicts despite the objection of opposing counsel which was sustained by the court. "Reetz's attorney managed to mention million-dollar awards seven times, even though objections to these arguments were made and sustained on four occasions." *Id at 406.* Moreover "the judge failed to instruct the jury to ignore these references and the references were so numerous that it is doubtful any instruction would have been effective." *Id.* Here Plaintiff's counsel made no additional comments after the objections were sustained and the court immediately and during final instructions issued curative instructions to the jury.

company was "ruthless" and cared nothing for "little Dr. Hanczaryk" lacked the drama and inflammatory rhetoric of *Gilbert* and could not justify a new trial. *Id*. at *15. Similarly, in *Bero Motors, Inc. v. General Motors Corp.,* 2006 WL 2312182 (2006), this Court held that "although plaintiff's argument invoked stereotypes of honest, small-town businessmen up against a large, urban, impersonal corporation, it did not include the same degree of inflammatory rhetoric that the plaintiff's counsel resorted to in *Gilbert.*" *Id*. at *6. Finally, in *Wilson v. General Motors Corp.,* 183 Mich.App. 21 454 N.W.2d 405, this Court found no error in allowing Plaintiff Counsel's comments in a race discrimination case to list the different forms that discrimination can take, including "…a bunch of guys in white sheets standing on your front lawn burning a cross." *Id.* at 26-27.

Moreover, any concern regarding comments in Plaintiff's opening statement were cured by the trial court. Following Plaintiff's opening statement, the Court issued a curative instruction, instructing the jury to disregard the few statements made by Plaintiff to the effect that it should "send a message" to the school district. (Trial Tran 2/28, p 140). Another curative instruction actually authored by Defendant was included in the jury's final instructions. (Trial Tran 3/7/18, p 87). Thus, viewed in context of the whole record, there is no evidence of a deliberate, concerted and insidious attempt to prejudice the jury or deprive Defendant of a fair and impartial trial. Rather Plaintiff's counsel's comments were isolated and brief and do not appear to have figured prominently in the jury's verdict. Any error was harmless. Thus, the Court of Appeals properly found that the trial court did not abuse its discretion in denying the motion for new trial.

CONCLUSION AND RELIEF REQUESTED

The Defendant has not identified any reason for this Court's intervention. This appeal arises from a relatively straight-forward WPA retaliation claim which was tried to a jury for one

week. There were no instructional or other errors. In short, the trial was fair and the Defendant's only real objection is that it is unhappy with the outcome. The trial court did not err in utilizing the model jury instructions, which require that retaliation be a determining factor, not just a motivating factor, as asserted by the Defendant. Nor did the trial court err in denying a new trial due attorney misconduct. The Court of Appeals correctly affirmed the verdict, awarded by the jury, finding no error or abuse of discretion by the trial court.

For all reasons given and authorities cited above, Ms. Davis requests that this Court deny the Defendant's application for leave to appeal and affirm the decisions of the lower courts.

Respectfully submitted,

PITT, McGEHEE, PALMER BONANNI & RIVERS, P.C.

By: */s/ Beth M. Rivers*
MEGAN A. BONANNI (P52079)
BETH M. RIVERS (P33614)
CHANNING E. ROBINSON-HOLMES (P81698)
Attorneys for Plaintiff-Appellee
117 West Fourth Street, Ste. 200
Royal Oak, MI 48067
(248) 398-9800
mbonanni@pittlawpc.com
brivers@pittlawpc.com
crobinson@pittlawpc.com

Dated: September 22, 2020